

# **SIMMONS**

# **EXHIBIT 3**



**APPEARANCES CONTINUED**

**For the Plaintiffs**  
**Continued:**

**David K. Willingham, Esq.**  
**Michael Roth, Esq.**  
King & Spalding LLP  
633 W. Fifth Street, Suite 1600  
Los Angeles, CA 90071

**For the Defendants:**

**Brian Morris, Esq.**  
**Tanisha R. Payne, Esq.**  
**Sean Fern, Esq.**  
U.S. Attorney's Office, EDNY  
271 Cadman Plaza East  
Brooklyn, NY 11201

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1 THE COURT: Hi. Good morning, everyone. It's  
2 Judge Cho. We're here for a conference in *In re*  
3 *Forfeiture Order of Tim Leissner, et al.*, case number 23-  
4 mc-1505.

5 Who do we have on for the government?

6 MR. MORRIS: Oh yes, good morning, Judge. For  
7 the government, it's Brian Morris joined by Sean Fern  
8 with the Department of Justice's Money Laundering and  
9 Asset Recovery Section as well as AUSA Tanisha Payne on  
10 the line as well. Good morning.

11 THE COURT: Who's on for Russell Simmons and Nu  
12 Horizons?

13 MR. ALBERTS: Good morning, your Honor.  
14 Jeffrey Alberts of Pryor Cashman. And I'm accompanied  
15 today by Aaron Wiltse who's an associate in our office.

16 THE COURT: All right. Who's on for Kimora Lee  
17 Simmons-Leissner?

18 MR. ROTH: Good morning, your Honor. This is  
19 Michael Roth and David Willingham of King Spalding, for  
20 Kimora Lee Simmons.

21 THE COURT: All right. Who's on for Ken  
22 Siazon?

23 MS. PARLOVECCHIO: Good morning, your Honor.  
24 Gina Parlovecchio of Mayer Brown on behalf of petitioner  
25 Ken Siazon.

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1 THE COURT: All right. And finally, who's on  
2 for Mr. Ng?

3 MS. GERAGOS: Good morning, your Honor. This  
4 is Teny Geragos of Agnifilo Intrater for Mr. Ng.

5 THE COURT: All right. Good morning, everyone.  
6 And thanks for rescheduling to today.

7 We have a number of things we want to cover.  
8 There's a motion to quash the subpoena directed toward  
9 the Pryor Cashman attorneys, a motion by counsel as well  
10 to expand the scope of discovery, and a motion by the  
11 government to subpoena a witness in Italy.

12 All right. So why don't I take the subpoena  
13 issue first? Mr. Morris, let me hear from you first.  
14 You issued subpoenas to depose these Pryor Cashman  
15 attorneys. Do you want to be heard on that request to  
16 conduct those depositions?

17 MR. MORRIS: Yes, Judge. On the motion to  
18 quash, Mr. Fern is going to address that at this point.

19 THE COURT: All right. Go ahead, Mr. Fern.

20 MR. FERN: Yes, your Honor. As a threshold  
21 matter I think we reject the premise of Pryor Cashman's  
22 motion that we are seeking to depose opposing counsel in  
23 this case. I think the cases that the government cites  
24 in its response are that we are not actually seeking to  
25 depose opposing counsel, we are seeking to depose the

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1 transactional counsel who dealt with the fundamental  
2 transactional documents at issue in this proceeding. And  
3 the cases that we cite to show that there's a -- you can  
4 distinguish between those two. And therefore, the  
5 Friedman analysis that guides Pryor Cashman's filings is  
6 inappropriate and inapposite.

7 THE COURT: Now, let me ask you, Mr. Fern --  
8 let me interrupt you for a minute. What I'm trying to  
9 understand is why you need these depositions of these  
10 lawyers. I understand these are lawyers that were  
11 involved in executing or negotiating the agreement at  
12 issue in this case. In the absence of those depositions,  
13 are you still able to respond to any motions that are  
14 filed in this case? In other words, do you need their  
15 testimony?

16 MR. FERN: I believe we do, your Honor. I  
17 think being able to depose the attorneys who created the  
18 foundational documents at issue here and understanding  
19 what key terms within those documents mean would give us  
20 a context required in order to adequately respond or file  
21 a good motion in this case.

22 And I would say that just opposing counsel, the  
23 Cooley LLP attorneys, would give us an incomplete  
24 understanding of the different terms at issue here. We  
25 don't know necessarily how their recollections may differ

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1 or especially with respect to the member interest  
2 transfer agreement at issue here. It is our  
3 understanding that the Cooley LLP attorneys were not  
4 necessarily involved in the drafting of that agreement.  
5 That was primarily the work of Pryor Cashman.

6 THE COURT: So this discussion brings me back  
7 to my first year of law school where we talked about  
8 contracts. I know there are no other agreements that the  
9 parties are disputing to what they entail and what they  
10 actually mean. But my recollection is if we're going to  
11 rely on these contracts or these agreements, that's it.  
12 You don't look at extrinsic evidence in connection with  
13 these contracts.

14 So what I'm asking you, Mr. Fern, then is are  
15 you trying to have it both ways? Are you going to rely  
16 on these agreements in terms of the standing argument and  
17 being able to respond to what Mr. Simmons sets forth  
18 ultimately, or will you be relying on this extrinsic  
19 evidence as well as to what these agreements really mean  
20 based on the testimony of these lawyers? Are you trying  
21 to have it both ways?

22 MR. FERN: No, we're not trying to have it both  
23 ways, your Honor. I think it's just important to have  
24 context for specifically how certain terms of the (audio  
25 cut out) drafted, what they mean because we were not

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1 necessarily present at the creation of those agreements.

2 I think --

3 THE COURT: On the inside --

4 MR. FERN: -- depending on -- I mean our  
5 argument is that, our argument primarily is that the  
6 agreements can be interpreted from the face of the  
7 agreements themselves. And if your Honor chooses to rule  
8 in that way, I think that would be fine, but I think we  
9 still need the context for these agreements and the  
10 specific terms at issue.

11 THE COURT: All right. I mean look, you can  
12 certainly make alternative arguments but I'm just saying  
13 you need context as to what certain terms of this  
14 agreement mean. Are you essentially saying that you  
15 believe that these agreements are ambiguous?

16 MR. FERN: No, not necessarily, your Honor. I  
17 think a lot of it just depends on how your Honor rules  
18 with respect to the threshold scope of discovery issue.

19 THE COURT: All right. Mr. Alberts, do you  
20 want to be heard on your motion to quash?

21 MR. ALBERTS: Your Honor, my associate Aaron  
22 Wiltse will be addressing that motion.

23 THE COURT: All right. Go ahead.

24 MR. WILTSE: Good morning, your Honor. I first  
25 want to turn to the threshold issue that the government



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1 raises which is more or less because these lawyers have  
2 not appeared in this case. They are not protected by  
3 Friedman at all.

4           They cite three cases for this argument and  
5 none of them actually said that. Two of them, *Brock*  
6 *(phonetic) Petro* and *Chase Manhattan* were decided upon  
7 the Shelton rule from the Eight Circuit which is  
8 obviously not the law in this circuit. This isn't  
9 important just because they were applying the wrong  
10 standard. It's important because the Shelton rule  
11 generally does only apply to trial counsel. But under  
12 Friedman, that categorical rule doesn't really apply and  
13 instead puts that analysis to the extent that it's  
14 relevant into the second factor, the role of the lawyer.

15           *Broncort* (phonetic), which is the primary case  
16 that they cite for this argument, makes this quite clear.  
17 Although the government is correct that *Broncort* does  
18 discuss the distinctions between trial and non-trial  
19 counsel, it does so as part of the Friedman analysis.

20           So I'll discuss this more when I get to that  
21 factor but I just wanted to quickly dispel their argument  
22 that Friedman doesn't apply to the situation at all  
23 simply because the lawyers, you know, haven't filed  
24 notices of appearance in this case.

25           Turning to the third factor, I think, as your

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1 Honor was kind of just getting at, I think the government  
2 quite obviously loses here. You know, they argue that  
3 this testimony is at the heart of the threshold standing  
4 issue in this litigation and they offer three categories  
5 of testimony that they're looking for but they completely  
6 fail to argue why they can't get this information from  
7 anyone else, just Mr. Simmons or the other parties to the  
8 transactions or the negotiations. And a lot of the  
9 information that they're really trying to get with these  
10 depositions is quite obviously privileged.

11 So the third category boils down to Mr.  
12 Simmons's motivation for entering into the letter of  
13 intent and the stock transfer agreement.

14 Again, as your Honor just noted, the government  
15 is talking out of both sides of its mouth here. As  
16 recently as Friday they oppose some of our discovery  
17 requests saying that given the clear language of the  
18 merger clause that's at issue, after the fact statements  
19 by a party about their subject beliefs regarding a  
20 contract are not probative as an aid to interpreting the  
21 contracts at issue. And that's either their position or  
22 it isn't.

23 And I think that, you know, they just  
24 articulated that they need context for terms in the  
25 contract. It's unclear to me what that means other than

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1 their subjective legal impressions as to the meaning of  
2 the contract which, you know, isn't really relevant to  
3 this Court's determination and the plain meaning of the  
4 contract.

5 And the distinction between what they're  
6 looking for here which is just, you know, a fishing  
7 expedition for legal opinions of Mr. Simmons's lawyers  
8 compared to the type of extrinsic information we're  
9 looking for, is that our theory is that these agreements  
10 are unenforceable because of the fraudulent intent of  
11 Kimora Lee Simmons and Time Leissner. That's a key part  
12 of our legal theory. It's independently legally relevant  
13 what their intent was as to the enforceability of the  
14 agreement.

15 But here the government is just on a fishing  
16 expedition for what Mr. Simmons's lawyers think now about  
17 the contract.

18 But a bit more to the point is if the  
19 government really wants to know what Mr. Simmons's  
20 motivations were for entering into the contract, they  
21 should ask him when they depose him which they're already  
22 planning to do and they're entitled to do. They haven't  
23 articulated any reason why they need to get this  
24 information from Mr. Simmons's lawyers instead of Mr.  
25 Simmons himself.

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1           And you know, if you take the government at  
2 their word, what they really want to know is what Mr.  
3 Simmons told his lawyers about his motivation and that  
4 information obviously would have been attained as part of  
5 privileged conversations between Mr. Simmons and his  
6 lawyers. So you know, even if it were relevant to this  
7 case, it's clearly privileged and totally off the table.

8           The second category of information that they're  
9 asking about is the events surrounding the letter of  
10 intent and the representations, the letter of intent and  
11 the stock transfer agreement as well as the  
12 representations made during those negotiations. And you  
13 know, whatever the government really means by the events  
14 surrounding the negotiation of these agreements, they  
15 don't even attempt to articulate why the Pryor Cashman  
16 lawyers are the best people or the only people that they  
17 can get this information from. There were other people  
18 party to the agreement. They will have the emails  
19 themselves. They haven't even tried to articulate why  
20 the Pryor Cashman attorneys' impressions at those  
21 meetings is relevant so that they need them.

22           As for whatever representations were made  
23 during the negotiations, the government already has some  
24 of these emails. And I think the complete lack of any  
25 examples or representations in these emails that they can

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1 point to that they want more information about is quite  
2 telling. But a bit more to the point, representations by  
3 their nature are made from one party to another. And the  
4 government hasn't offered any reason at all why they  
5 can't depose the counterparties to those representations.

6 The third, the facts and opinions in emails  
7 that the lawyers sent about these agreements. And again,  
8 the government already has some of these emails. They  
9 haven't offered a single example of a fact or an opinion  
10 contained in the emails that they offered that they need  
11 more information about or why that would be relevant to  
12 this case. And in any event, especially with respect to  
13 whether opinions were offered in these emails, any  
14 information that the lawyers could testify about beyond  
15 the, you know, because it's in the emails, is certainly  
16 going to be their privileged, you know, mental  
17 impressions and legal advice about these documents.

18 So I think in sum, the government has  
19 completely failed to allege why any of the information  
20 that they seek is somehow only available from the  
21 lawyers. And for anything that deals with the lawyers  
22 are the only people who would know, that's their  
23 impressions of Mr. Simmons's motivation or what their  
24 legal opinions were as to the terms of the contract.  
25 That information is almost certainly going to be

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1 privileged.

2 And you know, I would submit that, as Judge  
3 Brodie has held, a very weak showing on this factor alone  
4 is sufficient reason to grant this motion to quash. And  
5 I submit that this is exactly one of those scenarios  
6 where the government has completely failed to articulate  
7 a need to depose the lawyers.

8 Turning to --

9 THE COURT: Why don't you hold on for one  
10 second? Mr. Fern, do you want to address any of those  
11 points?

12 MR. FERN: Yes, a few points, your Honor.

13 First, as to the *Broncourt* case that we cite  
14 to, it says that you just can't hide behind litigation  
15 counsel to shield from discovery all relevant  
16 information.

17 Here again, we're talking about not after the  
18 fact statements but before the fact statements that would  
19 sort of guide the government and guide the parties in  
20 understanding a lot about the transactions and how they  
21 came to be. And especially, you know, we cite in our  
22 briefing a lot about how the negotiations have to be at  
23 arms length and between sophisticated counsel. And I  
24 think a lot of what we hope to obtain or need to obtain  
25 for our case is along those lines as well.

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1           THE COURT: Okay. Let me turn back to counsel  
2 for Mr. Simmons. Mr. Wiltse, anything else you want to  
3 add on your end?

4           MR. WILTSE: As to the first point or turning  
5 to the second factor under Friedman?

6           THE COURT: I don't think I need to hear  
7 outsiders. I'm inclined to grant the motion to quash the  
8 subpoenas.

9           Turning to you, Mr. Fern, my view is seeking  
10 depositions of counsel, even transactional counsel, is a  
11 high bar. And given that the discovery period has been  
12 extended, I do think that there are alternative  
13 mechanisms by which you can obtain this same information  
14 short of deposing these attorneys. So I'm prepared to  
15 grant the motion to quash the subpoenas as to the  
16 lawyers. Okay, Mr. Fern?

17           MR. FERN: Okay. What about (indiscernible),  
18 your Honor? The document subpoena for external  
19 communications?

20           THE COURT: Yes. In other words, the discovery  
21 directed towards the lawyers as to depositions and the  
22 documents in connection with your subpoenas I am  
23 quashing. All right?

24           MR. FERN: Okay.

25           THE COURT: I'm granting the motion to quash.

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1 All right? My view is there are alternative mechanisms  
2 by which you can obtain that same discovery whether it's  
3 deposing Mr. Simmons or other witnesses in this case  
4 short of deposing and getting documents from these  
5 transactional lawyers. So I am granting the motion to  
6 quash. Okay?

7 MR. FERN: Okay.

8 THE COURT: All right. Now, also with the  
9 government, you filed a motion to subpoena a witness in  
10 Italy. Help me out, how do you pronounce this guy's  
11 name?

12 MR. FERN: (Indiscernible).

13 THE COURT: Hoffman (indiscernible)? Okay.  
14 All right. Do you want to be heard on your motion for  
15 the subpoena?

16 MR. FERN: Yes, your Honor. I think -- again,  
17 this is Mr. Fern. 28 U.S. Code Section 1783 allows the  
18 Court to issue, to order the issuance of a subpoena to a  
19 U.S. citizen living abroad if it's in the interest of  
20 justice. And I think as we've laid out in our motion,  
21 the statutory test is met for this case and the witness  
22 has told the government, has told the FBI that he does  
23 not intend to come to the United States to sit for a  
24 deposition.

25 THE COURT: All right. Let me ask you a



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1 question. So in your motion, do you indicate that he's a  
2 business associate of Mr. Simmons or a business partner?  
3 Is that correct?

4 MR. FERN: That's correct.

5 THE COURT: All right. What information are  
6 you hoping to obtain from this witness that you can't get  
7 from Mr. Simmons?

8 MR. FERN: He again was part of the  
9 negotiations surrounding the transactional documents at  
10 issue in this case.

11 With respect to the actual negotiations, I  
12 think he took a much more essential role than petitioner  
13 Simmons did in actually negotiating and effectuating  
14 these transactions. I actually wrote in our motion he  
15 was a percipient witness to the transactions at issue.

16 THE COURT: Have you been in contact with him  
17 or in touch with him through a lawyer of his?

18 MR. FERN: No, the FBI I understand called his  
19 cell phone which is a U.S. cell phone and he picked up  
20 and said that he was in Italy.

21 THE COURT: Okay. Does anyone on the line now,  
22 counsel for Simmons, Lee, Siazon, or Ng object to this  
23 request for subpoena?

24 MS. GERAGOS: Your Honor, this is Teny Geragos  
25 for Mr. Ng. We support this request for a subpoena for

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1 Mr. (indiscernible).

2 THE COURT: Okay. Anyone else?

3 MR. ROTH: Yes, your Honor. This is Michael  
4 Roth for Kimora Lee Simmons. We also support the  
5 request. I'll just add that Mr. (indiscernible) was an  
6 executive member of Nu Horizons and probably has unique  
7 information about Nu Horizons from his position at the  
8 company.

9 THE COURT: Okay. All right. So turning back  
10 to Mr. Fern --

11 MR. ALBERTS: Your Honor?

12 THE COURT: Yes, go ahead. Who is this?

13 MR. ALBERTS: Your Honor, this is Jeffrey  
14 Alberts for Mr. Simmons. And I guess our main concern is  
15 that, you know, at this point we literally are not being  
16 allowed to obtain documents that is in the custody of  
17 other parties in which they make explicit representations  
18 about whether they do own or don't own Nu Horizons.

19 So given that that's the situation, it's  
20 completely inconsistent with the limitations that are  
21 being imposed on Mr. Simmons to allow the other parties  
22 to, you know, try to require individuals to fly in from  
23 other countries so that they can ask them questions just  
24 in the hope that maybe they have something to say that is  
25 relevant to the ownership of Nu Horizons.

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1           So we just want a level playing field. Like if  
2 the Court is going to allow the other parties to engage  
3 in this kind of very broad exploratory discovery into  
4 witnesses that are not parties to the agreements that  
5 even the government is focused on and just because they  
6 might have information, then Mr. Simmons should be  
7 allowed to obtain information that is literally in the  
8 possession of the other parties and it's directly about  
9 the ownership of Nu Horizons which they currently are  
10 refusing to turn over.

11           THE COURT: All right. Let me hear from Fern  
12 or Mr. Morris on that issue. So as I understand Mr.  
13 Alberts's argument on behalf of Mr. Simmons, his view is  
14 if the government's going to fly in a witness from Italy  
15 for a deposition in connection with the ownership issue  
16 of Nu Horizons, they should also be permitted to expand  
17 the discovery that they requested as it relates to what  
18 may be in the possession of the government and other  
19 parties in this case. So I mean Mr. Morris or Mr. Fern,  
20 do you want to be heard on that argument?

21           MR. MORRIS: Yes. Yes, Judge. Hi. This is  
22 Brian Morris.

23           You know, so our view on it is that we have  
24 responded. Frankly, the request as to the agreements at  
25 issue and the question of the ownership fall within those

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1 requests that the government has already agreed to search  
2 for and produce relevant documentation or responsive  
3 documentation and in fact has done so. So we don't  
4 really think that there's any expansion that's  
5 necessary.

6           You know rather, when we talk about like a  
7 witness from the communications that we've seen thus far,  
8 Mr. Erlp, I hope that's the right pronunciation, you  
9 know, was involved in structuring and basically handling  
10 these transactions as a business associate of Mr. Simmons  
11 and therefore, as Mr. Fern had mentioned, is a percipient  
12 witness to these particular transactions.

13           In fact, it's actually consistent with your  
14 Honor's ruling just a few moments ago that we should  
15 seek, you know, try to get the information that we're  
16 seeking about these particular agreements and  
17 transactions that were effectuated pursuant to them from  
18 other witnesses beside the attorneys that represented Mr.  
19 Simmons at the Pryor Cashman firm. This is one such  
20 witness.

21           So we're simply really trying to respect the  
22 Court's prior rulings and do not believe that any  
23 additional enhanced scope of discovery would be necessary  
24 because what we intend to ask him are the very agreements  
25 that we've already agreed to produce information and

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1 responsive documents on.

2 THE COURT: Now, Mr. Morris, in connection with  
3 this witness as well, is it the goal of the government or  
4 perhaps other parties to determine whether these  
5 agreements do in fact say what the agreements say? Or  
6 are you questioning whether these agreements perhaps say  
7 something else? Is that the purpose of these depositions  
8 or this deposition?

9 MR. MORRIS: Well, I mean I think there's a few  
10 different purposes. We really, you know, what we're  
11 really looking at here is sort of agreements on paper.  
12 You know, we do have some communications incidentally  
13 that we did not get from Mr. Simmons. We actually got  
14 the communications from, you know, counsel for Ms. Lee  
15 and we produced them as part of our discovery. You know,  
16 those are the communications that we were seeking before  
17 that we're not going to be able to get from the Pryor  
18 Cashman firm based upon your Honor's prior ruling.

19 So you know, ultimately what we really want to  
20 be able to sort of establish and just get -- you know,  
21 this sort of puts some meat on the bones if you would I  
22 think is the best way to say it to really explain the  
23 situation from start to finish how these agreements came  
24 to bear, how they were entered into, that they were  
25 executed, you know, that they were effectuated.

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1           And we didn't really see, you know, a witness  
2 out there who would be more likely to have that  
3 information than this particular one given that Mr.  
4 Simmons was not like, as far as we can tell from the  
5 communications we've seen thus far, he wasn't like  
6 handling the day to day. You know, he has both given his  
7 role, you know, he has folks that reported to him or that  
8 were associates of his that kind of handled this and  
9 that's what we see from the communications.

10           We really want to be able to ask about the  
11 communications, find out what's going on, and really  
12 provide a clear record to the Court in ruling on any  
13 potential motion that the government may make at the end  
14 of this expedited discovery period.

15           THE COURT: So refresh my recollection now.  
16 For any of these agreements that we've been discussing,  
17 is he a signatory to any of these agreements?

18           MR. MORRIS: Well, yeah. Actually --

19           MR. ROTH: Your Honor, this is --

20           MR. MORRIS: Yeah, go ahead.

21           MR. ROTH: Yeah. This is Michael Roth for  
22 Kimora Simmons.

23           Mr. Erlp was a signatory to the stock transfer  
24 agreement. He signed it on behalf of Nu Horizons and on  
25 behalf of West Digital Media. There were only three

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1 signatories to that agreement. There was Mr. Erlp, Mr.  
2 Simmons, and Ms. Lee.

3 The subsequent agreement Mr. Erlp was not a  
4 signatory to because it didn't have -- the parties didn't  
5 match up. You know, that's a key issue in this case of  
6 whether the December agreement could have unwound the  
7 earlier stock transfer agreement without all the  
8 signatures. And Mr. Erlp is the key witness for that  
9 issue.

10 THE COURT: Okay. All right. Given that he  
11 was a signatory to at least one of these agreements, I  
12 will allow the subpoena. I will so order the subpoena.  
13 But at the appropriate time if necessary I will certainly  
14 consider any objections or a motion to quash the subpoena  
15 if in fact he ends up responding to the subpoena that  
16 way. Okay? So I will grant the motion to subpoena Mr.  
17 Erlp. Okay?

18 All right. Now, the next issue deals with Mr.  
19 Simmons's request to expand the scope of discovery based  
20 on his review of the document production. So Mr. Alberts  
21 or Mr. Wiltse, do you want to be heard on your request?

22 MR. ALBERTS: Yes, your Honor. So before I get  
23 into --

24 THE COURT: Remind me is this Mr. Alberts or  
25 Mr. Wiltse?

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1 MR. ALBERTS: I'm sorry, this is Jeffrey  
2 Alberts.

3 THE COURT: Go ahead. Thank you.

4 MR. ALBERTS: So before I get into our general  
5 argument regarding the scope, I just want to briefly  
6 address the relevant comment that the government made.  
7 And the government is saying it is agreeing to produce  
8 all documents that relate to ownership but there are  
9 multiple examples of categories of documents that  
10 directly relate to ownership that they're refusing to  
11 produce.

12 One example is request number 12 which is the  
13 bond application. So a bond application is when a party  
14 goes into the court and says I should be entitled to be  
15 released because I have all these assets. But then they  
16 give the government, and ultimately that's presented to  
17 the Court, a list of assets. In this case some of those  
18 assets are the Celsius shares. Presumably there's some  
19 kind of representation about who owns the Celsius shares  
20 and how they own them. The government's refusing to turn  
21 that over.

22 Similarly --

23 THE COURT: Okay. Let's take it one at a time,  
24 let's take it one at a time since you mentioned that.

25 Request number 12. Mr. Morris or Mr. Fern,



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1 counsel believes there was a bond application which lists  
2 certain assets including information related to  
3 ownership. Are you in possession of that document? Do  
4 you know what he's referring to?

5 MR. MORRIS: You know, we do actually have, I'm  
6 sure we have the bond application. We have not, you  
7 know, sort of searched for and sort of polled it to  
8 actually review the ultimate content of it. But we're  
9 happy to have had addressed the sort of substantive  
10 objection that we have with respect to producing it for  
11 sure.

12 THE COURT: All right. Do you want to be heard  
13 then on your objection without necessarily having that  
14 document in front of you?

15 MR. MORRIS: Yes.

16 THE COURT: (Indiscernible) there. Go ahead.

17 MR. MORRIS: Yes. Thank you, Judge. So you  
18 know, unlike what we were sort of just discussing before  
19 with respect to the witnesses and documentation  
20 concerning a particular agreement, what we're talking  
21 about here is an after the fact ex post facto statement  
22 or discussion that we believe is what is being searched  
23 for here. And based upon the case law that we had  
24 decided to your Honor in our submission here as well as  
25 the initial submission in which your Honor ruled that the

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1 government did not have to produce this information, you  
2 know, the ex post facto statement about the ownership,  
3 you know, of either Nu Horizons or the Celsius shares is  
4 really an after-the-fact statement because the merger  
5 provisions in the contract surrender those statements and  
6 material.

7 I think on the ex post facto statements Mr.  
8 Simmons that cited to the *United States v. Julius Baer*  
9 case. And there, the Court had actually held that the  
10 claimant's own tax records mentioning the property at  
11 issue, were relevant to the topic of his standing, but  
12 you know, that case did not involve contracts like we  
13 have here with very, very carefully, it appears carefully  
14 inserted merger provisions which render the extrinsic  
15 evidence as to about what one might have said after the  
16 fact just plainly irrelevant. So we think that case is  
17 distinguishable.

18 And so at the end of the day, we think given  
19 the district court's ruling here asking for focused  
20 discovery on this question of standing, the parties  
21 should be directed to the key transactional agreements  
22 and that's really what the government has been focused on  
23 all the while and we think that, you know, the focus of  
24 the discovery should be limited to those agreements and  
25 the legal impact of them, including as we've heard before

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1 just mentioned, the impact of the MITA agreement. As  
2 counsel for Ms. Lee mentioned, there's like an issue as  
3 to whether the MITA agreement is legally effective to  
4 undo or void ab initio the prior transfers given that it  
5 appears that like not every party on the MITA was  
6 actually, you know -- not every signatory to the prior  
7 agreement was actually on the MITA.

8           So those are the kind of issues that will sort  
9 of bear, or you know, the decision on standing should  
10 turn on, not what one witness or another might have said  
11 after the fact about this question of ownership given the  
12 particular burden. I mean this particular one is not a  
13 whole lot of burden because it's a small set of documents  
14 but, you know, consistent with the other requests, you  
15 know, where there are burdens placed on the government to  
16 search its vast database. You know, we think the prior  
17 ruling should stand.

18           THE COURT: All right. No, I understand that.  
19 So Mr. Morris, why don't you look at that bond  
20 application. Okay? Since I don't necessarily disagree  
21 that it's not a burden to look at that argument. Take a  
22 look at it and if there's information in there that goes  
23 to the question of ownership of Nu Horizons, I believe  
24 that's what Mr. Alberts is seeking, take a look at that  
25 and see whether that's a document that could be produced.

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1 Okay?

2 MR. MORRIS: Okay. Yes, your

3 MR. ALBERTS: Your Honor, just to be clear --

4 THE COURT: Hold on. Go ahead, Mr. Morris.

5 One at a time. Mr. Morris, you were going to say  
6 something.

7 MR. MORRIS: Yeah, no problem. I was just  
8 acknowledging your Honor's prior ruling and we will go  
9 ahead and do that and specifically to see whether or not  
10 there's any mention, you know, given that the burden is  
11 quite limited, any question as to the ownership of Nu  
12 Horizons set forth within the bond application.

13 THE COURT: Okay. Mr. Alberts, were you going  
14 to say something?

15 MR. ALBERTS: Yes. I was just going to clarify  
16 that the primary way that it's likely that the  
17 representations will be relevant to the ownership of Nu  
18 Horizons is representations that would be concerning the  
19 Celsius stock. So the Celsius stock, you know, it's the  
20 position of the government, that it was owned by Nu  
21 Horizons. The Celsius stock we understand was used as an  
22 effort to support the bond.

23 So statements about who owned the Celsius  
24 stock, whether it said, you know, Tim Leissner, Kimora  
25 owns it, Nu Horizons owns it, whatever was said, those

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1 are relevant to the ownership of Nu Horizons because it's  
2 very common for somebody to say, you know, for example, I  
3 own an asset when they own it indirectly through some  
4 entity. So any statements about who actually owns the  
5 Celsius shares is indirectly a statement about who owns  
6 Nu Horizons which is the entity --

7 THE COURT: All right. So Mr. Morris, Mr.  
8 Morris, take a look at the bond application. All right?  
9 I'm not saying you need to produce it at this point in  
10 time. Take a look at it. If there's information in  
11 there regarding ownership of Nu Horizons or Celsius, as  
12 Mr. Alberts just discussed, have a conversation with Mr.  
13 Alberts to see whether that's a document that the  
14 government is prepared to produce. Okay?

15 If there are other objections to production of  
16 that document, we can have a conversation about it if it  
17 needs to be redacted in some way or otherwise, but have  
18 the conversation with Mr. Alberts about that document  
19 once you obtain it. Okay, Mr. Morris?

20 MR. MORRIS: Yes. Absolutely. Thank you, your  
21 Honor. All right. Mr. Alberts --

22 MR. ROTH: Your Honor, your Honor? I'm  
23 sorry --

24 THE COURT: Yes, go ahead, Mr. Roth.

25 MR. ROTH: -- this is Michael Roth.

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1 THE COURT: Okay. Go ahead, Mr. Roth.

2 MR. ROTH: Yes, this is Michael Roth for Kimora  
3 Lee Simmons.

4 I just wanted to point out the same request was  
5 propounded to Ms. Lee and the burden is significantly  
6 different for Ms. Lee which is we would have to search  
7 171,000 documents and sort through (indiscernible)  
8 anything whether it was pertaining to -- was protected by  
9 the marital privilege and other issues. And whereas  
10 anything that was actually submitted to the government  
11 should be in the government's possession. And we'd like  
12 to be clear that we are not a part of a requirement of  
13 that search at this time.

14 THE COURT: Okay. Understood. I'm only going  
15 to ask the government to try to obtain that document if  
16 it has it readily available. Okay?

17 All right. Mr. Alberts, I know your request is  
18 a bit more broader than just request number 12. Are  
19 there any other specific requests you want to discuss in  
20 this point in time?

21 MR. ALBERTS: Yeah. Another specific request  
22 was request number 16. And I would note that, you know,  
23 the government earlier on this call said it was agreeing  
24 to produce all the documents that relate to ownership.  
25 It's already modified that position and admitted it's not

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1 agreeing to produce documents that relate to ownership  
2 that were created after the MITA. That's a very  
3 different position. And that is actually the  
4 government's position.

5 Request number 16 is another document that  
6 falls into that category. It's a document that was --  
7 request 16 relates specifically to a representation that  
8 was made by Tim Leissner in which he said that Russell  
9 Simmons was the beneficial owner of the Celsius shares  
10 through Nu Horizons. It's hard to imagine a more  
11 directly relevant statement. And yet both parties are  
12 refusing to produce the documents that relate to that  
13 request which is directly about the ownership of Nu  
14 Horizons by Russell Simmons. We think they should have  
15 to produce all those documents.

16 THE COURT: All right. So you're referring to  
17 a very specific document, a document from February 2020,  
18 correct?

19 MR. ALBERTS: Well, documents concerning that  
20 document, yes. That representation in that document. So  
21 I think we have that document, but anything that concerns  
22 the statement in that document or that document that's  
23 the nature of the --

24 THE COURT: All right. That February 2020  
25 document, what is that document?

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1 MR. ALBERTS: I do not have it in front of me.  
2 I believe it's a written statement by Tim Leissner saying  
3 that Russell Simmons is a beneficial owner of the Celsius  
4 shares. I mean that's part of what we want in discovery  
5 is to know exactly what that document is. Like any  
6 information that anyone has about it, you know, how it  
7 was created, who created it, who sent it, what the basis  
8 for it was. You know, we want to know.

9 THE COURT: Right. And your view is that  
10 document, the February 5, 2020 document, supports your  
11 position. Is that fair to say?

12 MR. ALBERTS: Yeah, we think it supports our  
13 position but more to the point, I don't think either side  
14 should be limited to documents that support their  
15 position. It's relevance.

16 THE COURT: I understand. But I'm asking you  
17 the February 5, 2020 document, the statements set forth  
18 in that document support Mr. Simmons's position in this  
19 case. Is that fair to say?

20 MR. ALBERTS: Yes.

21 THE COURT: Okay. So help me understand what  
22 more do you need beyond that? Well, let me ask you  
23 another question. Your understanding is that statement  
24 was prepared by Mr. Leissner, correct?

25 MR. ALBERTS: We think so. But whatever



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1 information anyone has about it is going to shed light on  
2 it. Presumably the other parties are not going to just  
3 concede yes, that's accurate. So you know, if for  
4 example, Kimora met with Tim Leissner and they drafted it  
5 together and they basted it on a bunch of other documents  
6 they had, that would be very helpful to know.

7           You know, any other information that other  
8 people have will affect the strength of the arguments  
9 that Mr. Simmons can develop based on the statement this  
10 is in that document.

11           And this goes more generally to the point that  
12 it's not the case that a document in order to be relevant  
13 to ownership has to be determinative on ownership which  
14 seems to be the government's position. Like the  
15 government's position seems to be anything after the MITA  
16 can't be relevant even if it's an explicit statement  
17 about ownership because he didn't determine the  
18 ownership. But that is not how relevance works. Mr.  
19 Simmons should be allowed, for example, to confront Ms.  
20 Lee with any statements that she made where she said that  
21 she didn't own Nu Horizons.

22           The government can't just rely on documents  
23 that say she does own Nu Horizons but not provide us with  
24 information that we could use to inquire other witnesses  
25 about whether or not they actually had ownership. And

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1 that may lead to fruitful lines of examination in  
2 depositions which is why discovery works that way.  
3 You're not required to only produce documents that are  
4 determinative of the issue. It's documents that may shed  
5 light on the truth or falsity of the position that you're  
6 taking and the other side is taking.

7 THE COURT: Right. I understand.

8 MR. ALBERTS: And (inaudible).

9 THE COURT: I understand. But I'm also  
10 balancing the needs of this case given the issues before  
11 the Court at this point in time but also proportionality  
12 as well.

13 So as I understand it in request number 16, you  
14 are looking for any additional documents that form the  
15 basis for the representations in that document that Mr.  
16 Simmons has beneficial ownership of the Celsius stocks.  
17 Is that fair to say?

18 MR. ALBERTS: Or that relate to it in some  
19 other way. For example, if Ms. Lee and her husband were  
20 sending drafts of that document back and forth by email,  
21 we would want to see those drafts by email. Or if they  
22 were chatting by text with each other whether they should  
23 send that statement, we would want to see those texts  
24 where they're chatting about whether to send that  
25 document. And it's not likely that that's going to be a

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1 huge number of documents or tremendously burdensome on  
2 anybody. And it relates directly to an incredibly  
3 powerful piece of evidence.

4 THE COURT: All right. Mr. Morris or Mr. Fern,  
5 do you want to be heard on request number 16?

6 MR. MORRIS: Yes, we would. Thank you so much,  
7 Judge. I mean look, I think where there's a significant  
8 difference here is that based upon the integration  
9 provisions of the contract, you know, what defendant  
10 Leissner may or may not have said in 2020 about transfers  
11 that took place in 2018, and specifically what he may  
12 have said about the Celsius shares when the issue here is  
13 whether or not for standing purposes Mr. Simmons, you  
14 know, was a member of Nu Horizons or had a membership  
15 interest in Nu Horizons is really not relevant to the  
16 question, the very narrow question that the parties have  
17 been asked to focus in on for this purpose of standing.

18 We said before, and no reason to rehash it, but  
19 you know, the transfers are governed by those contracts  
20 and what defendant Leissner or frankly any other third  
21 party said sort of after the fact of who owns what is  
22 just really immaterial.

23 And you know, the law really is pretty clear.  
24 We've cited the cases on it as to the importance of this  
25 rather than -- you know, given the ultimate, you know,

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1 the size of our sort of database and I was just sort of  
2 thinking about how we would go about even trying to find  
3 something like this if we were to have it, it's just not  
4 entirely clear to us at this point how we're going to  
5 even approach that.

6 But suffice it to say, we just think that the  
7 balancing between relevance and proportionality on 16,  
8 you know, shouldn't counsel in favor of any further  
9 discovery on this document that the defendant Leissner  
10 had made.

11 THE COURT: Mr. Roth, do you want to be heard  
12 on this (inaudible)?

13 MR. ROTH: Yes, I do, your Honor. And let me  
14 say we do agree it's not relevant. But let me provide a  
15 little context for this document.

16 It's a letter written on February 5, 2020 on Nu  
17 Horizons' letterhead by Mr. Leissner. Ms. Lee wasn't  
18 involved in the drafting of this document. And we  
19 produced the document and have searched for documents  
20 relating to it. The actual creation of the document,  
21 there's not going to be other documents to produce.

22 The problem with this request is it's much  
23 broader than what has just been described to you because  
24 it includes any documents concerning Ms. Lee's awareness  
25 about this document, her knowledge concerning this

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1 document, or her belief in the truth of this statement.  
2 And we've spent the last three years in California  
3 litigating over this document. We've had hearings that  
4 have gone on for hours. We've had I think almost three  
5 hours of hearings in trial court. We've had an appellate  
6 argument. There's a petition to the Supreme Court  
7 including on the veracity of this document. And the  
8 expansive scope of this request goes way beyond the  
9 document itself and its creation. The burden on that  
10 would be minimal.

11 Request number 16 states, like many of these  
12 requests, it starts with a narrow statement and then goes  
13 on to have including clauses. There are (indiscernible)  
14 require the production of thousands of documents, or  
15 pages of documents.

16 THE COURT: Mr. Alberts, I'll give you the last  
17 word. Anything else you want to say on request number  
18 16?

19 MR. ALBERTS: Yeah. I guess if there were  
20 thousands of pages of documents about whether Ms. Lee  
21 thought it was true that Russell Simmons owned Nu  
22 Horizons, we should see those thousands of pages of  
23 documents.

24 MR. ROTH: I'm sorry, (inaudible cross talk) --

25 MR. ALBERTS: That is the core of this --

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1 MR. ROTH: -- the documents (inaudible cross  
2 talk) --

3 THE COURT: Mr. Roth, one at a time.

4 MR. ROTH: -- (inaudible cross talk) --

5 THE COURT: Mr. Roth, hold on. Mr. Alberts has  
6 the floor. Go ahead, Mr. Alberts.

7 MR. ALBERTS: And my second point is the fact  
8 that Ms. Lee has been expending substantial resources in  
9 another action to I guess avoid producing these documents  
10 doesn't mean they're not relevant. To the extent that  
11 she has documents that are about whether or not she  
12 believed that Russell Simmons owned Nu Horizons, those  
13 are obviously within the scope of permissible discovery  
14 in a dispute that is focused on whether or not Russell  
15 Simmons owned Nu Horizons. That is the core of the  
16 standing dispute that is currently before the Court.

17 THE COURT: All right. Mr. Roth, you want to  
18 be heard? You were going to say something else.

19 MR. ROTH: Yeah. That just misstated what I  
20 said completely. There are thousands of pages of  
21 documents in the California case that relate to the  
22 veracity of the statements in this document. They're not  
23 thousands of documents about this document and the  
24 underlying ownership issue. And many of those documents  
25 are privileged.

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1           These requests are drafted in such a broad  
2 term, you have a letter brief about the scope of  
3 discovery, but they don't address the scope of these  
4 particular requests. And the way Mr. Alberts is  
5 mischaracterizing my statements in these requests is  
6 incorrect.

7           THE COURT: All right. I'm going to deny the  
8 request for additional production regarding request  
9 number 16. I find based on the conversation we've had  
10 this morning that in fact the statements in that letter  
11 support Mr. Simmons's position. If they didn't, that  
12 would be different conversation we'd be having. But I do  
13 find that in light of the fact that they support Mr.  
14 Simmons's position, I think additional discovery beyond  
15 that would be disproportionate to the needs of this case  
16 at this time. Okay?

17           All right. Mr. Alberts, any other request you  
18 want to discuss today?

19           MR. ALBERTS: So the other arguments we wanted  
20 to make don't relate to the specific requests but rather  
21 the broader dispute between the parties. So may I turn  
22 to it now?

23           THE COURT: All right. You want to be heard on  
24 that?

25           MR. ALBERTS: Yes.

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1 THE COURT: All right. Go ahead.

2 MR. ALBERTS: So first of all, the government  
3 and Ms. Lee spent a great amount of their time attacking  
4 an argument that Mr. Simmons is not making which is that  
5 he's entitled to documents because they're relevant to  
6 other disputes in this action. That's just not the case.

7 Mr. Simmons is requesting documents that relate  
8 directly to his theories on standing and neither the  
9 government nor Ms. Lee have identified any document  
10 requests that are not relevant to Mr. Simmons's standing  
11 arguments.

12 The actual dispute here is not about whether  
13 the requests are relevant to Mr. Simmons's standing  
14 arguments. The actual dispute is whether the government  
15 and Ms. Lee can refuse to produce documents that are  
16 directly relevant to Mr. Simmons's standing arguments by  
17 offering summary judgment style attacks on the legal  
18 narrative of those arguments.

19 So I'd like to now turn to the only real  
20 dispute here which is about whether they can refuse to  
21 produce documents that are relevant to Mr. Simmons's  
22 standing argument. And on that, they basically argued  
23 two categories of arguments.

24 First, that Mr. Simmons's defenses are based on  
25 pure speculation. That should be denied because they're



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1 speculative. There's not a factual basis.

2 And second, that Mr. Simmons's defenses are  
3 legally flawed.

4 So turning first to the argument on whether  
5 they're speculative. Defenses for which they are  
6 refusing to produce responsive documents include first  
7 that Kimora secretly sold Keyway Pride before signing the  
8 stock transfer agreement and therefore lacked authority  
9 to execute the stock transfer agreement. So there's a  
10 clear factual basis for that which is that Celsius  
11 Holdings, the company itself, filed an SEC filing that  
12 stated that Keyway Pride had been sold before the stock  
13 transfer agreement was executed. That's a clear factual  
14 basis.

15 It's not -- neither is it disputed that Kimora  
16 concealed from Russell Simmons that she no longer owned  
17 Keyway Pride when she signed the document on behalf of  
18 Keyway Pride. So the argument then owner of Keyway Pride  
19 can't act on behalf of the company after selling it is  
20 hardly speculative.

21 The second defense that Kimora offers is that  
22 she was entering into the stock transfer agreement to  
23 defraud Russell Simmons with no intention of paying him.  
24 That also is not speculation. This isn't a situation in  
25 which, you know, Mr. Simmons is just saying I don't

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1 think -- I think maybe my ex-wife wasn't going to pay me.  
2 There are very specific facts that support this.

3 First, as I mentioned about Kimora did not  
4 disclose to Russell Simmons when she signed the stock  
5 transfer agreement under which Keyway Pride promised to  
6 pay him 14 million, the Keyway Pride was no longer owned  
7 by her. That's obviously a major deception and it's not  
8 factually disputed. It's also obviously a huge material  
9 change that from Russell Simmons's perspective he wasn't  
10 doing a deal with his ex-wife who he knew well, he was  
11 doing a deal with some Middle Eastern businessmen whose  
12 identity has not been disclosed to him as counterparties.

13 Second of all, both parties here make much of  
14 this notion that the idea that there was some type of  
15 attempt to engage in an asset protection scheme that  
16 Kimora and Tim Leissner were engaged in in May of 2018 is  
17 just this wild speculation.

18 But there's a very clear factual basis in the  
19 record from the trial of Roger Ng as to that being the  
20 case. Tim Leissner testified under oath that he and  
21 Kimora were planning in 2018 to sell assets including  
22 Keyway Pride to Ghanim Al-Saad and then hide the proceeds  
23 in a bank in Liechtenstein.

24 He testified that Ghanim owned Newland Limited.  
25 He explained that the plan was for Kimora to sell Keyway

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1 Pride to Gamine through entities that he owned including  
2 Newland, and he testified that this is part of an asset  
3 protection plan and that as part of this plan he and  
4 Kimora went to Liechtenstein in May 2018 and the two of  
5 them met with lawyers and trust companies in an effort to  
6 hide the assets.

7           And he testified that what the plan was was to  
8 sell the assets to Ghanim Al-Saad, then put the proceeds  
9 from the sale in a bank in Liechtenstein where nobody  
10 could touch them. This was in May 2018. This is the  
11 exact time period when she entered into the stock  
12 transfer agreement with Russell Simmons which was dated  
13 May 25, 2018 right when during the period that she was  
14 going to Liechtenstein. And who was the company that was  
15 secretly owning Keyway Pride? It was Newland. It was  
16 Ghanim Al-Saad. We have evidence that this is exactly  
17 what was happening.

18           Third, another powerful piece of evidence that  
19 Kimora intended to quickly sell the assets to Newland and  
20 then hide the proceeds in Liechtenstein rather than pay  
21 Russell Simmons is that Russell Simmons in fact wasn't  
22 paid. So everything happened exactly the way that Tim  
23 Leissner testified, who's a cooperating witness for the  
24 government, exactly the way that he testified it was  
25 supposed to work during his trial. So that's hardly

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1 speculation. This is incredibly compelling and direct  
2 evidence that there was fraud going on.

3 THE COURT: So Mr. Alberts, let me stop you for  
4 a minute there. Given that you have all this evidence  
5 supporting your argument that there was a fraud going on  
6 here, what more do you need in discovery then if you  
7 already have all this evidence that's corroborated?

8 MR. ALBERTS: Well, the evidence that we have  
9 is evidence of Tim Leissner, that he was engaging  
10 generally in an asset protection scheme that involved  
11 Newland. Presumably Ms. Lee is going to say that this  
12 transaction wasn't part of that scheme, that even though  
13 yes, it involved Newland and it was done right when she  
14 traveled to Liechtenstein, in fact it was a good faith  
15 contract that she was signing and is completely  
16 enforceable. We need evidence to rebut that. That's  
17 what discovery is for. We're not required to rely on,  
18 you know, the testimony of Kimora's ex-husband who's a  
19 cooperating witness and who presumably Ms. Lee will feel,  
20 you know, very entitled to attack.

21 THE COURT: I understand. But the evidence you  
22 have for Mr. Leissner, that evidence supports your view  
23 as to the fraud that took place in this case and your  
24 client's standing. Is that fair to say?

25 MR. ALBERTS: It supports it, yes. I mean it's

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1 a good faith basis for us to make these highly relevant  
2 document requests. It can't be a Catch-22 where you  
3 can't request documents unless you have a good faith  
4 basis but if you have a good faith basis you're then not  
5 allowed to get the documents because you already have the  
6 good faith basis.

7 THE COURT: I understand. But during the  
8 timeline that we're operating under here, right, I'm  
9 trying to balance the burdens on all parties and the  
10 proportionality of the request as well. Right? You have  
11 evidence that you articulated of this alleged fraud by  
12 Leissner in protecting his assets. Right? So what  
13 you're seeking now I suppose is, and that evidence  
14 supports your position, I take it you're trying to seek  
15 evidence to the contrary, right, which would  
16 theoretically hurt your position. Is that fair to say?

17 MR. ALBERTS: No, that's not at all what I was  
18 trying to say. The focus of the trial of Roger Ng was  
19 not on Mr. Simmons's ownership interest in Nu Horizons.

20 THE COURT: Understood.

21 MR. ALBERTS: There were statements made that  
22 there was a fraud going on involving Newland. The  
23 primary discussion was about other assets of Newland.  
24 And while it provides a good basis for us to inquire  
25 further of Ms. Lee, who was the person who actually

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1 signed all of these documents and who isn't the person  
2 who testified in this way at the trial, to confirm  
3 whether or not this transaction was actually part of that  
4 fraudulent scheme unless she's willing to concede it.

5 But if she's going to deny it and sit on all the  
6 documents that she has that are relevant to that, that  
7 will not allow us to properly develop our defense.

8 THE COURT: Okay. What would be helpful for  
9 the Court is, I know you've listed your requests  
10 specifically, if there are specific requests for which  
11 you think you still need responses, I think it might be a  
12 more efficient way to proceed that way as opposed to this  
13 broad perspective where you want all discovery related to  
14 this alleged fraudulent transaction. All right? If  
15 there are specific requests for specific documents for  
16 which you want responses to, it might be more productive  
17 talking about each of those individually. Okay?

18 I'm not prepared at this point to reconsider my  
19 prior view as to the scope of discovery. I know we've  
20 addressed a couple of these requests today including  
21 number 16 and 12 and 13 relating to the appearance bond.  
22 If there are specific documents for which you think you  
23 still need responses, or request any responses to, maybe  
24 we could address it that way. Okay?

25 MR. ALBERTS: Okay.

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1           THE COURT: But just a broad let's expand the  
2 scope of discovery I'm not prepared to think about it in  
3 that fashion. Okay?

4           MR. ALBERTS: Okay. I would just like to say,  
5 if I may, one quick thing on the nature of the burden  
6 because it seems like the reason that Mr. Simmons is not  
7 being allowed to obtain documents that support his  
8 defenses is somehow based on a concept of proportionality  
9 or burden. And I would just like to underscore that  
10 first of all, this is a billion dollar dispute. The  
11 burden that is being cited by the government and Ms. Lee  
12 are nowhere close to what is customary in a dispute for  
13 even a tiny fraction of this size.

14           And second of all, it's not the case that the  
15 government has been withholding documents because it  
16 doesn't have the resources to devote to identifying the  
17 documents. It's withholding the documents tactically.  
18 The government claims that its database has 4.5 million  
19 documents but it also has told Mr. Simmons that it  
20 individually reviewed every document in the database that  
21 contained the terms Kimora, Keyway, Nu Horizons and  
22 Celsius. It says it reviewed them.

23           So at this point there's no burden if they  
24 looked at those documents in a database. It could click  
25 responsive and produce or not responsive. And document

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1 after document it refused to produce them.

2 At the last oral argument, the government  
3 stated there were 44,000 hits for Kimora and 18,000 hits  
4 for Celsius. But the total number of documents produced  
5 for those two terms and the term Nu Horizons and Keyway  
6 is 129 documents. So it's not the case that the  
7 government is avoiding producing documents because of a  
8 constraint on resources or proportionality. It's sitting  
9 there looking at all the documents that have the words Nu  
10 Horizons and document after document saying don't  
11 produce, don't produce, don't produce, don't produce.

12 And to sum up that process, after the  
13 government devoted all the resources it needed to look at  
14 every single document that refers to Nu Horizons, it's  
15 producing a total of 129 documents.

16 So there's no disproportionality, there's no  
17 burden. There's just a tactic to further the  
18 government's litigation strategy not producing documents  
19 that it is looking at and that it knows we've requested  
20 and we want because it thinks it would advance its chance  
21 of prevailing in this action to not turn them over.

22 THE COURT: All right. Let me turn back to the  
23 government. Now, in document number 52, which is your  
24 response to the motion filed by Mr. Simmons, in footnote  
25 4 you refer to your view of the underlying agent notes



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1 302 and the statements and you indicated that there are  
2 about I believe 264 pages of documents that could be  
3 responsive. Is that correct, Mr. Morris?

4 MR. MORRIS: Actually, Mr. Fern was going to  
5 address that. He's done the work on that.

6 THE COURT: Go ahead, Mr. Fern.

7 MR. MORRIS: Okay. Thank you.

8 MR. FERN: Yes, your Honor. Now, so there are  
9 191 pages of 302s, seven 302s that total 191 pages. On  
10 top of that, there are also 264 pages of notes that are  
11 attached to those 302s. So the ultimate number would be  
12 191 plus 264.

13 THE COURT: All right. So about 400 plus  
14 pages?

15 MR. FERN: That's right.

16 THE COURT: All right. And is it your view --

17 MR. FERN: 455.

18 THE COURT: Is it your view that these  
19 documents are responsive to the requests that you had  
20 agreed to respond to?

21 MR. FERN: Not the bulk of the 302's. There  
22 may be like portions of those 302s that may be responsive  
23 in part. The bulk of the 302s go to the underlying 1MDB  
24 investigations of fraud. There are just specific  
25 portions of those seven 302s that are potentially

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1 responsive.

2 THE COURT: All right. Are you open to  
3 producing perhaps in redacted form some of those notes?

4 MR. FERN: One second, your Honor. No, your  
5 Honor, we would not be because as we wrote in footnote 4,  
6 it would just be impossible or impractical to separate  
7 the responsive portions from the non-responsive portions.

8 And in addition, I think the case that we cite  
9 at the end of our thing, the -- one second, your Honor.  
10 *The American Oversight v. Department of Justice* case that  
11 we cite, (2d. Cir. 2022), those 302s are attorney work  
12 product and therefore we would not want to only reveal  
13 portions of attorney work product.

14 THE COURT: Okay. When you say it's impossible  
15 to parse out the responsive and non-responsive portions,  
16 what do you mean by that? You can't redact certain parts  
17 that are non-responsive?

18 MR. FERN: It just wouldn't make sense because  
19 you would need the context of the underlying sort of  
20 paragraphs that they're broken up into. Part of the 302s  
21 discuss, you know, underlying parts of the investigation  
22 and then how it ties to the responsive part. So it just,  
23 it would be like a broken sentence.

24 THE COURT: All right. And these are I think  
25 you mentioned statements from seven different witnesses

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1 or is that -- how many witnesses are memorialized in  
2 these statements? Is it just one person?

3 MR. FERN: One witness. The government's  
4 cooperating witness.

5 THE COURT: Okay. So Leissner?

6 MR. FERN: Yes.

7 THE COURT: All right. Mr. Alberts, do you  
8 want to be heard on the notes?

9 MR. ALBERTS: Yes. Two things. I mean first  
10 of all, I think there are a number of current and former  
11 federal prosecutors on the line and every federal  
12 prosecutor knows that not only is it possible to turn  
13 over redacted versions of 302s, it happens in almost  
14 every criminal trial. It's part of your Brady and Giglio  
15 obligations and prosecutors do it all the time. Courts  
16 expect it. No prosecutor said with a straight face, look  
17 at a district court judge in a criminal case and say we  
18 just can't turn over the Brady and Giglio because we  
19 can't figure out how to redact the interview notes.

20 And that's such a common process that when  
21 they're prepared, the people preparing them often know  
22 that they're going to be later turned over. And that's  
23 completely typical, it happens all the time and it's  
24 absurd to assert that it's something that cannot be done.

25 And to the extent that there are portions where

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1 it's difficult for some reason, there are well  
2 established ways of addressing those reasons. So you  
3 know, it may be possible to retype a summary of a certain  
4 portion if it's somehow not relevant.

5 But also in this case there's a protective  
6 order. You know, there potentially could be a way of  
7 addressing issues through an attorneys eyes only order.  
8 Those are all readily achievable.

9 With respect to the government's citation to  
10 *American Oversight v. United States Department of*  
11 *Justice*, I would just point out that the distinction that  
12 the federal courts draw both in the Second Circuit and  
13 outside the Second Circuit is between fact and opinion  
14 testimony. And the courts have ordered the production of  
15 interview notes. So it's clearly not the case that  
16 interview notes are somehow protected as per se work  
17 product privilege.

18 For example, we cite *In re John Doe Corp.*, 675  
19 F.2d 482 (2d Cir. 1982) in which there was a requirement  
20 the interview notes be turned over, as well as *United*  
21 *States (indiscernible)* in which there was -- and it was  
22 D.C. Circuit decision. And that one it involved  
23 statements recorded by FBI agents and other criminal  
24 investigators. And the Court said that they had to be  
25 turned over because the relevant threshold was met.

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1           So I think in this case they should be  
2 required -- it's easy to redact and turn over just the  
3 portions that are relevant. It's not realistic to  
4 somehow undermine the government's law enforcement and so  
5 there are easy ways to address that issue. And they  
6 clearly fall into the category , 80 what I do the phone  
7 you of statements that were identified in *United States*  
8 *v. (indiscernible) Sports Corp.* of statements where  
9 there's a demonstrable need. So accordingly, we think  
10 that those statements should be permitted.

11           THE COURT: All right. How about this? Mr.  
12 Fern, why don't you produce those records to the Court in  
13 camera for the Court's review. Submit to the Court a  
14 clean version of the materials and a version that's  
15 highlighted where you highlight those portions of the  
16 statements that could be responsive to the request to  
17 which you had already agreed to respond to. Okay? If  
18 you can submit that to the Court in camera, how much time  
19 do you think you'll need to do that?

20           MR. FERN: I mean your Honor, the underlying  
21 302s may be a little bit easier, the agent notes. That  
22 would take substantially more time because again, they're  
23 handwritten notes and we would have to go back to the  
24 authors of the 302s to figure out what the notes, to the  
25 extent that they're unreadable or at least, you know,

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1 hard to decipher what was said. But the underlying 302s  
2 I think would take about a week.

3 THE COURT: Well, help me understand. Is there  
4 a difference between the typed notes and the handwritten  
5 notes? Are the typed notes summaries or are they based  
6 on the handwritten portions of the notes?

7 MR. FERN: No. So some FBI agents will  
8 handwrite their notes and then use their handwritten  
9 notes to generate the 302 which is the formal interview  
10 report. Other agents will handwrite -- will, I'm sorry,  
11 type their notes and then use those typed notes to  
12 generate the formal FBI 302 report.

13 THE COURT: Okay. Now, in terms of the  
14 handwritten notes, do you believe there's information in  
15 those handwritten portions that could be responsive?

16 MR. FERN: I presume they may be to the extent  
17 that it made its way into the actual formal 302 report  
18 but we haven't looked at the handwritten notes.

19 THE COURT: So just so I'm -- I want to be  
20 precise here. The handwritten notes were not sent (audio  
21 broke up) later on. Is that correct?

22 MR. FERN: They were typed up as a formal FBI  
23 302 report. So there are two sort of pieces to an FBI  
24 302 report. There's the formal report that gets -- that  
25 formally memorializes the interview. And then there's

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1 the notes that sort of an agent will take contemporaneous  
2 with the interview so that he can sort of refresh his  
3 recollection while preparing the formal report.

4 THE COURT: All right. So presumably  
5 whatever's in the handwritten portion, that was  
6 memorialized in the typed report. Is that fair to say in  
7 general?

8 MR. FERN: That's correct. Yes.

9 THE COURT: All right. So the 191 pages, those  
10 are the typed reports. Is that right?

11 MR. FERN: That's correct.

12 THE COURT: All right. And then the underlying  
13 handwritten portions are the 264 pages?

14 MR. FERN: That's right.

15 THE COURT: All right. So submit to the Court  
16 for in camera review just the typewritten notes, okay?  
17 The 191 pages. All right?

18 MR. FERN: Okay.

19 THE COURT: I do not need the handwritten  
20 notes. And submit to the Court one version that's  
21 highlighted where you highlight those portions that could  
22 be responsive. Okay? And the other --

23 MR. FERN: Okay.

24 THE COURT: -- (inaudible) copy. Okay?

25 MR. FERN: Sure.

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1 THE COURT: Now, you can go ahead and file that  
2 on the docket sheet under seal. Okay? And also give the  
3 Court a courtesy hard copy of that as well.

4 All right. And give me a date by which you can  
5 submit that to the Court. You tell me.

6 MR. FERN: Next Monday is -- hold on one  
7 second, your Honor. Would the 28th be okay for your  
8 Honor?

9 THE COURT: Make it the 29th.

10 MR. FERN: Okay.

11 THE COURT: Now, question for you. Typically  
12 in this situation I ask the government to produce a  
13 privilege log. Would it be just one line or would you  
14 have multiple lines on there? I assume you have multiple  
15 agents, right? This is not one interview. It's over the  
16 course of a period of time. Is that fair to say?

17 MR. FERN: Yes, your Honor. They date back  
18 from 2018 through around the time of Roger Ng's trial in  
19 2021. So the staffing changed over that time.

20 THE COURT: All right. Between now and May  
21 29th, can you prepare a privilege log as well?

22 MR. FERN: Sorry, one second. Yes, your Honor,  
23 we can do that.

24 THE COURT: Okay. So the privilege log, unless  
25 you have any objection, go ahead and file that publicly



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1 on ECF. Okay? So make sure Mr. Simmons has just a copy  
2 of that privilege log. Okay?

3 MR. FERN: Yes, your Honor.

4 THE COURT: All right. But the underlying  
5 documents, the handwritten portion, submit that under  
6 seal and a hard copy to chambers. Okay?

7 All right. Now, Mr. Alberts, after I've  
8 reviewed the submissions to the Court, I will address  
9 whether those should be reproduced and in what form if  
10 any at all. Okay?

11 MR. ALBERTS: Thank you, your Honor.

12 THE COURT: All right. Mr. Morris or Mr. Fern,  
13 anything else for the government today?

14 MR. MORRIS: Yeah, we have nothing else. Your  
15 Honor, just in terms of setting the record straight in  
16 case there's any further litigation as it relates to this  
17 issue and burden, I just wanted to sort of clarify that  
18 we have not -- this is not as easy as counsel for Mr.  
19 Simmons makes it out to be. When we ran for instance  
20 Celsius and Nu Horizons against the database, that was in  
21 response to a specific request that was date limited, you  
22 know, between 2018 and the present which was something  
23 that we were able to not have an undue burden in  
24 reviewing.

25 If we're going to expand something like Celsius

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1 and Nu Horizons out across the entire database going back  
2 years through the investigation, you know, that would  
3 present a significant and substantial burden. I just  
4 wanted to clarify that point. Thank you, Judge.

5 THE COURT: All right. Anything else for you,  
6 Mr. Alberts?

7 MR. ALBERTS: There is one other thing that I  
8 think is worth calling to the Court's attention which I  
9 guess is a (indiscernible) egregious example of how Mr.  
10 Simmons is kind of being subjected to a different burden  
11 than some of the other parties and that is the government  
12 requested from Mr. Simmons documents concerning Mr.  
13 Simmons's ownership of Nu Horizons including Mr.  
14 Simmons's tax filings, Mr. Simmons's financial records  
15 and other statements by Mr. Simmons of what the assets  
16 were that he owned. And the government requested those  
17 because the government thought that that was probative  
18 evidence on the ownership of Nu Horizons.

19 Mr. Simmons produced those. Mr. Simmons has  
20 made the exact same request of the government and Ms. Lee  
21 saying, you know, it's the positions of the other parties  
22 that Nu Horizons -- or Mr. Simmons's position is that Nu  
23 Horizons is owned by Mr. Simmons. The position of the  
24 other parties is that Nu Horizons was owned by either  
25 directly by Ms. Lee or indirectly through Keyway Pride.

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1           So the other parties should be required to  
2 produce the analogous records for Ms. Lee and Keyway  
3 Pride which would reflect in her tax statements, for  
4 example, whether she actually owned Nu Horizons. But the  
5 other parties are refusing to produce those documents  
6 even though the government requested them and Mr. Simmons  
7 produced them. And there's little more directly relevant  
8 to ownership than a sworn statement about whether you own  
9 something, whether it is in a tax filing or whether it is  
10 in like an application for a loan. And Mr. Simmons  
11 should not be, you know, required to produce these  
12 documents in response to requests from the other parties  
13 but then be denied to get the exact same analogous  
14 records from the other parties in order to defend his  
15 claim.

16           And this relates -- you had asked for specific  
17 requests which relates to request number 11 which  
18 includes tax filings by Nu Horizons and tax filings by an  
19 purported owner of Nu Horizons including Tim Leissner or  
20 Keyway Pride.

21           THE COURT: Just so I'm clear, request number  
22 11 directed for the government --

23           MR. ALBERTS: Both the government and Ms. Lee.

24           THE COURT: Okay. What I'd like to do is I'm  
25 going to schedule another call in a couple of weeks.

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1 Specific requests such as that one, Mr. Alberts, and the  
2 conversation with Mr. Roth. Okay? If the requests are  
3 tax records, maybe that's something the two of you can  
4 work out. Okay?

5 MR. ALBERTS: Understood.

6 THE COURT: All right. Anything else, Mr.  
7 Alberts?

8 MR. ALBERTS: No, your Honor.

9 THE COURT: Mr. Roth, anything else for Ms.  
10 Lee?

11 MR. ROTH: No, your Honor. Thank you.

12 THE COURT: All right. Ms. Parlovecchio?

13 MS. PARLOVECCHIO: Nothing further for us, your  
14 Honor.

15 THE COURT: All right. Ms. Geragos?

16 MS. GERAGOS: No. Thank you, your Honor.

17 THE COURT: All right. So we stay on track  
18 what I want to do is schedule another call on June 3rd at  
19 10 a.m. Mr. Morris or Mr. Fern, does that day and time  
20 work for you?

21 MR. MORRIS: If you can bear with us one  
22 second, Judge, and we'll let you know. Yes, that works.  
23 Thank you, Judge.

24 THE COURT: All right. Mr. Alberts?

25 MR. ALBERTS: Yes, your Honor.

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1 THE COURT: All right. Mr. Roth, what about  
2 you?

3 MR. ROTH: Your Honor, that works. If there's  
4 any way we can do it at 11 a.m. -- I'm sorry, would this  
5 be a remote appearance ora --

6 THE COURT: Yes, we'll do it by telephone.

7 MR. ROTH: If there's any way we can do it one  
8 hour later? I'm on the west coast (inaudible).

9 THE COURT: Okay. 11 a.m. is fine. Mr.  
10 Alberts, does that work for you?

11 MS. GERAGOS: Your Honor, this is Teny Geragos.  
12 I'm sorry, but before we confirm with everybody, I have a  
13 court appearance that morning in Yonkers and wondering if  
14 we can do it in the afternoon.

15 THE COURT: All right. How about 3 o'clock in  
16 the afternoon? Actually no, let's make that 2 o'clock.

17 MS. GERAGOS: That works for me. Thank you.

18 THE COURT: Does 2 o'clock not work for anyone?  
19 If so, please tell me now. Okay. Hearing no objection,  
20 we'll reconvene on June 3rd at 2 o'clock in the afternoon  
21 by telephone. Okay? I'll expect to see the court's or  
22 the government's submission on May 29th.

23 If there are additional motions that are going  
24 to be filed in advance of the June third conference, file  
25 it by also May 29th. Okay?

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1           So in light of that, if the parties need to  
2 meet and confer over any of the issues we've discussed  
3 today, do it before the 29th. Okay?

4           All right. With that, we are adjourned. Have  
5 a nice day, everyone.

6           ALL: Thank you.

7                       (Matter concluded)

8                       -oOo-

C E R T I F I C A T E

I, MARY GRECO, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 24th day of May, 2024.

  
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